It is also relevant to point out that the basis of a closing order is that "by reason of a nuisance a dwelling-house is unfit for human habitation" whereas for a demolition order the third condition precedent is that "the continuance of any building . . . is dangerous or injurious . . . ."

For these reasons this appeal was allowed.

Appeal Allowed.

HAJI SULAIMAN BIN HAJI ABDUL WAHID vs. PUBLIC PROSECUTOR.

[App. Crim. Juris. (McElwaine, C.J. (S.S.), Aitken, Ag. J.A. and Cussen, J.) August 23, 1941]

Criminal trial — Defence of alibi — Direction to Assessors — Criminal Procedure Code, Section 113.

In this country an observation by a trial Judge in his summing up to the Assessors to the effect that the failure of the accused to disclose an alibi defence in time to afford an opportunity of its being tested is something to be borne in mind with reference to the value of the defence can hardly ever be made in fairness to the accused in view of section 113 of the Criminal Procedure Code (Cap. 6).

Appeal from a conviction for the murder of Mary Zeinah Maxwell, section 302 of the Penal Code (Cap. 45), which resulted from a trial held on April 28th, 29th, 30th and May 1st, 2nd, 3rd at Ipoh before Mr. Justice W. K. Horne.

The appellant appealed to the Court of Appeal on various grounds. The case is reported on one point only.

Mr. J. L. Woods for appellant :—

The trial Judge misdirected the Assessors in connection with the non-disclosure of the defence at an earlier stage.

He stated "There is a peculiar thing about the accused's story: that he has not been able to call anybody else who saw him carry out this journey, either way, on the 5th November..... Clearly he must have known that though a person is on remand he is not prevented from sending for witnesses..... There is therefore that to be said about the accused's evidence, about his alibi evidence of the 6th, that he has not, so far as we know, so far as there is any evidence before us, ever disclosed it to anybody until some time shortly before his trial ....." and again later "Now as regards the 6th his evidence is an alibi.....and, as I say, it is a fact that it has never been produced until this trial".

These expressions used amounted to a serious misdirection. R. v. Naylor[1] lays down that adverse comments on a prisoner's failure to make a statement on a preliminary inquiry are improper and although the case has been distinguished and explained it has never been overruled. Parker's case[2] was decided on the basis that in justice to two prisoners who had disclosed their defences early a reference to that should be made in their favour, but this case does not support any proposition that adverse comment may be made on non-disclosure alone. Littleboy's case[3] explains that comment on non-production of a defence at the earliest opportunity is permissible but that observations must be made with great care and fairness to the accused and the distinction is pointed out between such comments when made fairly as a mere observation touching the credibility of the defence and such observations when suggesting a directly adverse inference unfavourable to the accused. The effect of these three cases is considered in Chhui Yi's case[5] and the English Law is there approved as being law in this country. Smith's case[4] which is a later English decision that was not cited in Chhui Yi's case seems to confine considerably further the scope within which a trial Judge should comment and is somewhat similar to the present case. Mr. Justice Singleton delivering the Judgment of the Court at p. 124 states: "having commented inaccurately on that part of the case the Acting Deputy Chairman, proceeded to tell the jury that both prisoners had said nothing when they were before the Magistrate. They were entitled to say nothing. Each had given his answer to the police and each was represented at the Police Court. The fact that they said nothing at that stage ought not to have been used against them in the summing up. We think that there was misdirection in that respect also". This passage in the judgment, together with the observations of the Court as reported at page 122, shows clearly that the Court held the view that comment should not be made unless in exceptional circumstances such as existed in Parker's case. In the present case the observations of the learned trial Judge definitely suggest that the Assessors should take into account against the accused the fact that he made no statement at the preliminary inquiry. Furthermore, and this is of vital importance, the learned trial Judge has given a completely inaccurate direction in his comments. He has suggested that there is no evidence before the Court that the alibi was disclosed to anybody until shortly before the trial at the Assizes, and later he has stated to the Assessors as a fact that the alibi was never produced until the trial at the Assizes. The learned Judge had in his hands a copy of the Record at the preliminary inquiry at which the accused gave the name of a witness Yeop, whom he wished to call at his trial. That witness was a witness to his alibi and to nothing else, and, in the circumstances of the accused having put forward this witness at the preliminary inquiry, it was an entirely incorrect and unfair comment to suggest that the alibi had never been produced until the trial. Furthermore, the learned Judge must have known that statements are taken from accused persons by the police, and, in view of the fact that the learned trial Judge had no means of knowing whether or not the accused had set up his alibi to the police, the learned trial Judge should have confined his comments, if any were justified at all, to a most careful reference to Court proceedings only.

Mr. T. T. Russell, Assistant Legal Adviser, for respondent.

Cases referred to :—

(1) *Rex v. Naylor* 23 C.A.R. 177.

(2) *Parker's Case* 24 C.A.R. 2.

(3) *Rex v. Littleboy* 24 C.A.R. 192.

(4) *Smith's Case* 25 C.A.R. 119.

(5) *Rex v. Chhui Yi* (1936) M.L.J. 177.

The judgment of the Court of Appeal was delivered by:

Aitken, Ag. J. A. : — The attack upon the learned Judge's summing up in respect of alleged misdirections disclosed a more serious situation, which may well have prejudiced the case for the defence in the minds of the Assessors. Most of the alleged misdirections concern the alibi set up by the accused,

and it will be necessary to deal with them at some length.

In regard to that alibi, and its disclosure or non-disclosure to the police and prosecution, the following passage occurs in the learned Judge's summing up :—

> He (i.e., the accused) was, as you know, arrested and charged with this offence on the 7th and the preliminary enquiry took some time before he was committed to trial. Clearly he must have known that though a person is on remand he is not prevented from sending for witnesses if he wished to see them or from getting witnesses to corroborate his story. The police at that stage are not simply trying to fix a particular person with the crime. They are carrying out their public duty, investigating into the matter generally, even though they have a suspect in custody. There is therefore that to be said about the accused's evidence, about his alibi evidence of the 6th, that he has not, so far as we know, so far as there is any evidence before us, ever disclosed it to anybody until some time shortly before this trial when the little girl, his daughter, was interviewed in the presence of the police by Mr. Reid.

and a little later on we find :—

> Now as regards the 6th, his evidence is an alibi, and in testing an alibi you must have regard to the terms in which it is put before you and, as I say, it is a fact it has never been produced until this trial.

A number of cases in the English Court of Criminal Appeal, culminating in *Rex v. Littleboy*[3] have established the principle that a Judge may comment on the failure of an accused person to disclose an alibi defence until the actual trial, provided that he does so fairly and carefully. The need for the exercise of care is of peculiar importance in this country in view of the right given to the police to interrogate accused persons as and when they think fit, and in view of the provisions of section 113 of our Criminal Procedure Code, as amended by Enactment No. 19 of 1936, which forbid the giving in evidence of any statement made to the police by an accused person in the course of a police investigation. In England it may be proper for a trial Judge to observe that the failure to disclose an alibi defence in time to afford an opportunity of its being tested is something to be borne in mind with reference to the value of the defence. In this country, however, it seems to us that such an observation can hardly ever be made in fairness to the accused, because the Judge can seldom if ever know to what extent the police were aware of an intended alibi defence before trial.

We know that the accused in this particular case was interrogated by the police about 10 a.m. on the morning of the 7th November, 1940, and as he was not then arrested or detained, we may safely assume that he did not tell the police he had been at the Maryland Estate bungalow during the previous night. It is thus provable that the police knew, from the very beginning of their investigations, that the accused's defence was that of an alibi; and it is also quite likely that the nature of that alibi became known to them at the time of, or soon after his arrest, and was tested by them in every way that it could be tested. In this connection it is to be observed that the accused's wife was called as a prosecution witness.

In spite of these circumstances the learned Judge commented on the accused's defence in such a way as may well have led the Assessors to conclude that the accused had deliberately kept his alibi a secret from the police and prosecution up to the last moment, and those comments are not only of questionable accuracy in point of fact, but they also appear to us to have gone far beyond the limit laid down by the English Court of Criminal Appeal in the case of *Rex v. Littleboy*[3]. And if the Assessors were misled on this point, as we fear they may have been, then the case for the defence must have been seriously weakened in their eyes, and the chance of their attaching any degree of credence to the accused's alibi seriously prejudiced.

New Trial Ordered.